FORGED TRANSFERS OF STOCK: ANOTHER VIEW.

THE Supreme Court of Massachusetts decided, in Boston Co. *v.* Richardson,[1] that one who surrendered a share-certificate bearing a forged transfer, and obtained in exchange a new certificate, must not only return the new certificate but also pay damages to the company, although he bought the old certificate from his transferor and received the new one from the company in ignorance of the forgery. This liability of the innocent purchaser was based upon his implied representation or warranty of title, the court finding an analogy between the presentment of the certificate to the company for the purpose of substituting the purchaser in the place of the former registered shareholder, and the transfer of a certificate to a third person by way of sale. In an article upon "The Doctrine of Price *v.* Neal," in a previous volume of the REVIEW,[2] the present writer questioned the soundness of this analogy. He agreed that, as between the company and the innocent purchaser, the loss, to the extent of the value of the shares, must fall upon the purchaser,[3] but maintained that this resulted not from any obligation *ex contractu* to the company, but indirectly from his liability *ex delicto* to the registered owner, whose signature had been forged. The argument was as follows. The assumption of dominion over the certificate by the purchaser, who claimed under the forged transfer, however honest his conduct, was a plain conversion. The registered owner, therefore, had an election of remedies. He might sue the innocent purchaser in trover, or he might ignore the purchaser and assert his unchanged rights as a shareholder against the company. If he collected the value of the shares from the innocent purchaser, that was practically the end of the matter. He could not, after receiving the equivalent of the shares from the converter, claim also the shares themselves as against the company. By electing to get satisfaction from the converter he determined his right

[1] 135 Mass. 473.

[2] 4 HARV. L. REV. 297.

[3] This was the result in Brown *v.* Howard Co, 42 Md. 384, and Metropolitan Bank *v.* Mayor, 63 Md. 6.

against the company. The converter, therefore, after satisfying the judgment against him, would succeed to the rights of the former owner of the shares. But the loss rests upon him, for he has paid twice for the shares.

If, on the other hand, the former owner, instead of proceeding against the converter, elected to claim reinstatement as shareholder upon the books of the company, the claim against the converter was not extinguished. He was still bound to make satisfaction for his tort, but the owner of the converted certificate, electing to continue the dominus of the shares, could not collect for his own benefit from the converter. On principles of obvious justice he must hold the claim against the converter as a constructive trustee for the benefit of the company. It is on the same principle that one who has received the amount of a loss by fire from an insurance company holds for the benefit of the company a claim against a third person, who wilfully or negligently caused the destruction of the property insured. In any event, therefore, and quite independently of any doctrine of representation or warranty, the innocent purchaser and not the company must be the victim of the forged transfer. Similar reasoning, it was suggested, explained why the loss must, in any event, fall upon the innocent purchaser of a bill, claiming under a forged indorsement, even though it might have been paid to him.

Convincing as this reasoning was to the writer, he was unable to find any decisions upon forged transfers of stock which supported it. Recently, however, the Court of Appeal in England, in Sheffield Corporation *v.* Barclay,[1] declared, reversing the decision of Lord Alverstone, C. J.,[2] that one who presented a forged deed of transfer of shares to a company for the purpose of being registered as a shareholder made no representation as to the genuineness of the transfer and was not liable to the company either upon a contract of indemnity or upon a warranty.

In an article upon "Forged Transfers of Stock and the Sheffield Case," which appeared in the April number of the current volume of the REVIEW, this decision of the English Court of Appeal is criticised adversely, not only for its *ratio decidendi*, but also for its supposed inconsistency with the decision of the same court in Oliver *v.* Bank of England,[3] and with the affirming decision of the House of Lords in the same case, *sub nom.* Starkey *v.* Bank of

[1] [1903] 2 K. B. 580. [2] [1903] 1 K. B. 1. [3] [1902] 1 Ch. 610.

England.[1] Although recognizing, as every reader must recognize, the clearness and force with which this criticism is expressed, the present writer finds it impossible to agree with the learned critic upon either of his grounds of objection to the English decision, and he is moved, accordingly, to suggest certain distinctions and analogies which, it is hoped, may be helpful in bringing about a correct determination of the rights and liabilities growing out of forged transfers of stock.

We may consider first the alleged inconsistency of the two English decisions. Obviously the Court of Appeal in the Sheffield Case was unconscious of any change of front or of any disregard of the controlling judgment of the House of Lords in Starkey's Case. That case was cited in the Sheffield Case by the defendant's counsel and distinguished by the counsel for the plaintiff, but is not mentioned in any of the three judgments of the Lords Justices. Doubtless these judges shared the declared opinion of Lord Alverstone,[2] whose judgment they reversed, that Starkey's Case was irrelevant to the question then before the court. An examination of the facts of the two cases, it is conceived, justifies this opinion.

In Starkey's Case the controversy related to consols, the transfer of which must be made at the Bank of England, and is executed, not by an officer of the Bank, but by the transferor in person or by his duly authorized attorney. Starkey, a broker, having received a power of attorney to sell and transfer shares belonging to F. W. Oliver and E. Oliver, which purported to be signed by both, whereas E. Oliver's signature was forged by F. W. Oliver, went to the Bank, produced the power of attorney, signed the demand to act[3] indorsed on the power, and executed as "attorney"[4] the transfer to the purchaser in the books of the Bank,[5] the Bank permitting him to act for Oliver as the latter's agent. On these facts it was decided that the case was governed by the familiar doctrine of Collen *v.* Wright,[6] that one who purports to act as the agent of another in dealing with a third person warrants that he has authority so to act.[7]

---

[1] [1903] A. C. 114.

[2] [1903] 1 K. B. 18.

[3] "I demand to act by this letter of attorney." [1902] 1 Ch. 611.

[4] [1902] 1 Ch. 612.

[5] [1902] 1 Ch. 629.

[6] 8 E. & B. 647.

[7] Cozens-Hardy, L. J., suggested, [1902] 1 Ch. 616, another principle upon which the Bank might charge Starkey: "Would the brokers [Starkey & Co.] have any answer

In the Sheffield Case, on the other hand, the subject of transfer to Barclay, the innocent purchaser, was stock of the Corporation of Sheffield. Such stock is transferable only by a deed of transfer, a separate instrument from the certificates, which may or may not be delivered with the deed.[1] The grantee sends the deed to the corporation with a request for registration and the issue of a new certificate to him or his nominee, and the corporation is under a duty to the registered owner to register all genuine transfers made by him. This course was pursued in the Sheffield Case, but, unfortunately, the deed of transfer to Barclay was forged.

The difference between the two English cases is sufficiently clear. The transfer on the books in favor of Barclay was not the act of the former owner, or of his attorney, as it was in Starkey's Case, but the act of the corporation. Barclay, unlike Starkey, did not purport to the corporation to be acting as the agent of the registered owner, but for himself. When he sent the deed of transfer for registration, he presented what purported to be an order upon the corporation from the registered owner to substitute the grantee in his place as shareholder, just as the holder of a bill presents to the drawee what purports to be the order of the drawer to pay to the holder the amount of the bill. Confessedly the holder of a bill makes no representation or warranty that the signature of the drawer is not forged. It is difficult to see any distinguishing circumstances in the Sheffield Case, which justify the implication of any representation or warranty of the genuineness of the deed, that is, the order of transfer. The holder of the bill and the holder of the order of transfer are not in the attitude of sellers, who, of course, do warrant their title. On the contrary, they are calling upon the drawee and the corporation, respectively, to do their duty and to decide for themselves, and at their peril, the extent of their duty. They say in effect, "I hold a bill, or an order of transfer of stock, which I believe to be genuine, and which by its tenor directs you to pay me so much money, or to register me as shareholder. Obey or disobey this direction as you see fit, and at your own risk, whatever be your decision." This analogy between the position of Barclay and the holder of

---

to an action by the plaintiff [Oliver] to recover the purchase money of the stock [sold by Starkey & Co. to others]? And, if so, ought not the Bank, who have paid the plaintiff, to be subrogated to his right against the brokers?" This suggestion seems to be sound.

[1] They were not delivered to Barclay. [1903] 2 K. B. 590.

a bill upon which the drawer's signature was forged, was pointed out by Vaughan Williams, L. J.[1] The learned critic of the Sheffield Case characterizes the rule founded on Price *v.* Neal,[2] which protects the holder who has received payment of a bill on which the drawer's signature was forged, as anomalous. This seems hardly the adjective to apply to a rule which prevails throughout the British Empire, almost everywhere in the United States, and all over the continent of Europe. A rule so universal must be based upon a fundamental principle of justice. This principle may be stated as follows: If one of two innocent persons must suffer by the misconduct of a third, and their claims in point of natural justice are equally meritorious, the law will not intervene between them to shift the loss from one to the other. The continental decisions in cases like Price *v.* Neal are put clearly upon this principle, which was also, as it seems to the writer, the paramount reason for Lord Mansfield's judgment in this leading English case.[3]

It may be asked why the forged transfer in the Sheffield Case is not like the forged indorsement of a bill, in which case, as is well known, the innocent purchaser claiming under the forged indorsement must lose even if he has collected the bill, the law compelling him to refund the money.[4] Or, to put the question in another form, why is not the reasoning in the opening paragraphs of this article, by which the innocent purchaser of the share certificate, bearing a forged transfer, must suffer the loss to the extent of the value of the shares in cases like the Massachusetts case of Boston Co. *v.* Richardson,[5] equally cogent to the prejudice of Barclay in the Sheffield Case.

The answer is simple. The analogy fails between the Sheffield Case and the forged indorsement of a bill and between that case and the Massachusetts Case, because Barclay, unlike the innocent purchaser of the bill or certificate, was not guilty of a conversion

[1] [1903] 2 K. B. 590. Lindley, J., pointed out the same analogy in Simm *v.* Anglo-American Co., 5 Q. B. D. 196.

[2] 3 Burr. 1354.

[3] Unfortunately Lord Mansfield gave as another reason for his judgment the duty of the drawee to know the drawer's signature. The learned reader will find in 4 HARV. L. REV. 297 a statement of the writer's reasons for believing that the inability of the drawee to recover in cases like Price *v.* Neal does not depend upon any artificial theory of negligence nor upon the fictitious presumption that he knows the signature of the drawer.

[4] See cases cited in 4 HARV. L. REV. 307, n. 3.

[5] 135 Mass. 473.

of any document belonging to the person whose signature was forged. The latter's share-certificate was not delivered to Barclay.[1] Since, then, the true owner of the shares had no money claim against him, the corporation could not charge him indirectly by the principle of subrogation.[2]

James Barr Ames.

---

[1] [1903] 2 K. B. 590.

[2] Had Barclay retained the new certificate he might have been compelled to surrender it, not because he had gained it by a tort, but simply in order to protect the corporation. In spite of the registration in his favor, he was not in truth a shareholder, and the new certificate was therefore merely a representation, which could not operate as an estoppel in his favor, for he had not changed his position upon the faith of it, but which would charge the corporation by way of estoppel in favor of a *bona fide* purchaser, to whom Barclay might transfer it. Such a transfer, if made by Barclay after knowledge of the forgery, would be wrongful, and the corporation would be entitled, on the principle of *quia timet*, to the surrender of this document, of no value to Barclay and a possible source of mischief to the corporation. The corporation was also interested in having the outstanding certificates correspond to the registration of shareholders on its books.